

**Daval 37 Assoc., LLC v City Outdoor, Inc.**

2024 NY Slip Op 32641(U)

July 8, 2024

Supreme Court, New York County

Docket Number: Index No. 655211/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

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DAVAL 37 ASSOCIATES, LLC,  
  
Plaintiff,

**INDEX NO.** 655211/2023

**MOTION DATE** 02/27/2024

**MOTION SEQ. NO.** 001

- v -

CITY OUTDOOR, INC.,DEL MASTRO OUTDOOR,  
LLC,DEL MASTRO MEDIA, LLC,CITY OUTDOOR  
HOLDINGS LLC,CITY OUTDOOR USA, INC.,CITY  
OUTDOOR MEDIA LLC,CITY OUTDOOR MIAMI, LLC,CITY  
OUTDOOR PARTNERS, LLC,CITY OUTDOOR  
PROPERTIES, LLC,CYNTHIA DEL MASTRO, CYNTHIA  
DEL MASTRO, CYNTHIA DEL MASTRO, DAWN CHRUMA,  
DAWN CHRUMA, JENNIFER DEL MASTRO, JENNIFER  
DEL MASTRO

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 46, 47, 48

were read on this motion to/for DISMISS.

Upon the foregoing documents and after oral argument, defendants’ motion to dismiss is denied<sup>1</sup>.

Background

This action arises out of an alleged breach of a commercial lease agreement. Plaintiff, Daval 37 Associates, LLC (“Landlord”), is the owner and landlord of the subject premises, located at the second floor of a building located at 39 W. 37th Street, New York, New York 10018. On November 11, 2019, defendant, City Outdoor, Inc. (“Tenant”), entered into a commercial lease agreement with Landlord, and has been a tenant of the Premises since January 1, 2020. Rick Del Mastro (“Guarantor”), who passed away on April 15, 2020, was the guarantor

<sup>1</sup> The Court would like to thank Sophia Hartman for her assistance in this matter.

of Tenant's lease obligations pursuant to a Guaranty agreement (the "Guaranty") executed on November 11, 2019.

On January 31, 2021, Tenant allegedly vacated and abandoned the premises. Plaintiff claims that Tenant has breached its lease obligations by failing to replenish its security deposit and pay all rent and additional rent due while in possession of the premises as required by the lease. Plaintiff brings the instant action seeking to hold (1) Tenant, (2) various entities that have been the recipients of Tenant's assets, (3) Guarantor's estate (the "Estate"), (4) the beneficiaries of the Estate ("Beneficiaries"), and (5) the trustees of a bypass trust created by the Estate ("Trustees") liable for the alleged breaches, and further seeks damages stemming from Tenant's apparent abandonment of the premises.

Defendants, Cynthia Del Mastro, in her capacity as Executor of the Estate of Rick A. Del Mastro a/k/a Rick Anthony Del Mastro, Cynthia Del Mastro, in her capacity as Trustee of the Bypass Trust under article third of the Last Will and Testament of Rick A. Del Mastro a/k/a Rick Anthony Del Mastro, Deceased, Cynthia Del Mastro, in her individual capacity, Dawn Chroma, in her capacity as Trustee of the Bypass Trust Under Article Third of the Last Will and Testament of Rick A. Del Mastro a/k/a Rick Anthony Del Mastro, Deceased, Dawn Chroma, in her individual capacity, Jennifer Del Mastro, in her capacity as Trustee of the Bypass Trust Under Article Third of the Last Will and Testament Of Rick A. Del Mastro a/k/a Rick Anthony Del Mastro, Deceased, and Jennifer Del Mastro, in her individual capacity, (collectively, the "Moving Defendants") move to dismiss the complaint as asserted against them. Plaintiff opposes the instant motion<sup>2</sup>.

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<sup>2</sup> The Court notes that in reply the moving defendants contend that in opposition plaintiff failed to allege any arguments to support personal liability for the individually named defendants. Plaintiff made an application for sur reply based on the new arguments raised for the first tie in reply, and the Court granted that application. Notwithstanding the submissions, the Court declines to make a determination as to the individual defendants at this

### Standard of Review

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. “The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.” *Id.*

“In a motion to dismiss pursuant to CPLR § 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

### Discussion

Moving defendants seek to dismiss Landlord’s second cause of action against them, arguing that because Tenant surrendered the premises in accordance with the terms of the Guaranty, the Guarantor is no longer liable for Tenant’s obligations under the Lease. They further contend that because the liability of a surety "cannot be extended beyond the plain and

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juncture, as plaintiff was clearly prejudiced by the raising of the new argument on reply and not in the initial affirmation or memorandum of law in support of the underlying motion to dismiss.

explicit language of the contract," (63 N.Y. Jur.2d, Guaranty and Suretyship, § 89 [1987]), the absence of any provision within the Guaranty to bind the Estate indicates that no such obligation was intended or agreed upon by the parties.

Conversely, plaintiff maintains that upon the death of Guarantor, the liability taken on and the guarantee made by Guarantor now properly run to the Estate.

As to the second issue presented, the Estate, and thereby the Moving Defendants, properly assume Guarantor's liability. New York Courts have long recognized that "[i]t is a presumption of law, in the absence of express words, that the parties to a contract intend to bind not only themselves, but [also] their personal representatives" (*Stile v C-Air Customhouse Brokers-Forwards, Inc.*, 204 AD3d 429, 430 [1st Dept 2022] citing *Matter of Buccini v Paterno Constr. Co.*, 253 NY 256, 259 [1930] [internal quotation marks omitted]). *See also Chamberlain v Dunlop*, 126 NY 45, 52 [1891] ("The presumption is that the party making a contract intends to bind his executors and administrators, unless the contract is of that nature which calls for some personal quality of the testator, or the words of the contract are such that it is plain no presumption of the kind can be indulged in"); *see also Minevitch v Puleo*, 9 AD2d 285 [1st Dept 1959] ("The presumption of law that in the absence of express words, parties to a contract intend to bind not only themselves but their personal representatives, does not obtain in a contract for personal services. In such a contract [i.e., a personal services contract], the duty of performance is terminated by the death of the master or that of the servant.").

Because the lease was not a personal services contract that only the Guarantor could fulfill, but rather a nonpersonal services contract, the Guarantor's death does not terminate his liability. Instead, under New York precedent such liability properly runs to the Estate and the

moving defendants have failed to establish entitlement to dismissal of the second cause of action.

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied.

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7/8/2024

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: